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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3620 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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GUJARAT STATE ROAD TRANSPORT CORPORATION

Versus

MAGANLAL BHIKHABHAI RAVAL

Appearance:

1. Special Civil Application No. 3620 of 2002

MR KS JHAVERI for Petitioner No. 1

..... for Respondent No. 1

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 16/04/2002

ORAL JUDGEMENT

#. Heard Mr.K.S.Zaveri, learned advocate appearing on behalf of the petitioner - Corporation.

#. The petitioner Corporation has challenged the award passed by the Industrial Tribunal in Reference No.481 /

1998 dated 8th September, 2000, wherein the punishment imposed by the petitioner Corporation by order dated 6th May, 1991 stoppage of seven increments with cumulative effect has been modified as without cumulative effect with clarification that the respondent workman is not entitled to any amount of arrears of difference salary because of the said modification.

#. Learned advocate Mr.Zaveri appearing on behalf of the petitioner Corporation has submitted that this is clear case of dishonesty and misappropriation as the respondent workman had recovered the fare from four passengers of Rs.20/-. It is submitted that at the time when the bus was checked, tickets were not issued to the passengers and therefore, considering serious misconduct committed by the respondent workman, chargesheet was served and after completion of departmental inquiry, punishment was imposed by the competent authority by order dated 6th May, 1991 ordering stoppage of seven increments with cumulative effect. Learned advocate Mr.Zaveri has submitted that past record of the respondent workman was produced before the tribunal as well as before this Court, wherefrom it reflects that in all 58 misconducts reported to have committed by the workman, out of which, some are of similar nature and therefore, Mr.Zaveri submits that the tribunal cannot interference in such gross case where the respondent wrokman has recovered the fare and not issued the tickets to the passengers. Learned advocate Mr.Zaveri has also submitted that the tribunal has committed error in modifying the punishment while exercising the powers under Section 11-A of the I.D.Act. Learned advocate Mr.Zaveri for petitioner relying on a decision reported in 2000 [7] SCC pg.517 and submitted that the Apex Court has taken view that in case of dishonesty and misappropriation, punishment of dismissal is justified. Except above submissions, no other submission is raised by learned advocate Mr.Zaveri on behalf of the petitioner Corporation.

#. I have considered submissions made by learned advocate Mr.Zaveri. The respondent workman has raised the dispute before the Industrial Tribunal challenging the legality and validity of the punishment order dated 6th May, 1991. Before the Tribunal, the respondent workman has filed statement of claim vide Exh.5/1 and written statement was filed by the corporation vide Exh.6 and thereafter, inquiry papers along with past record was produced by the Corporation at Exh.11. Thereafter, the respondent workman vide Exh.34 has submitted Purshis to the effect that he is not challenging the legality and validity of the departmental inquiry. Thereafter, no

oral evidence was led by either side and the respective parties have closed their evidence vide Exh.33 and thereafter the labour court has considered the merits of the matter and modified the punishment order.

#. The contention raised by the learned advocate Mr.Zaveri to the effect that this is case of dishonesty and misappropriation and therefore, the tribunal has considered that in finding recorded by the competent authority in departmental inquiry, after considering the evidence led before the Inquiry Officer, the tribunal has come to the conclusion that not to issue tickets to the passengers when the bus was checked, there was no dishonest intention on the part of the respondent workman. Therefore, the tribunal has come to the conclusion that once there was no dishonest intention on the part of the workman for collecting the fare from the passengers and not issued the tickets, then looking to the misconduct, punishment imposed by the competent authority is harsh and unjustified. The allegations against the respondent workman, according to the chargesheet, on 28th August, 1997 the respondent conductor was on route from Nathdwara to Nadiad and at the time when his bus was checked by the checking staff, it was found that from four passenger travelling from Nathdwara to Udepur, the respondent workman has collected the fare of Rs.20/- and tickets were not issued and the impugned tickets were recovered by the checking staff. That from one passenger travelling from Nathdwara to Udepur, fare of Rs.7/- was collected and ticket was not issued by the respondent workman. Moreover, one passenger traveling from Nathdwara to Kailashgiri was found without tickets and no fare was collected by the respondent workman. In reply, explanation was given by the respondent workman that there was some exchange of words between the passengers and the workman and at the time of checking, in all, 29 passengers were found in the bus, out of them, four were found without tickets. Similar explanation was given by the respondent wrokman in the departmental inquiry. In inquiry proceedings, in response to the question, the workman has replied that on account of some exchange of words between the passengers and the conductor, he was not able to issue tickets immediately and more over, the passengers were speaking unknown language and that is how incident in question has occurred. On the basis of the said evidence, the competent authority has come to the conclusion that misconduct is found to have proved on the basis of the evidence produced in the departmental inquiry but in finding, the inquiry officer has categorically mentioned that not to issue tickets to four passengers though fare

was collected, there was no dishonest intention on the part of the respondent workman and the respondent workman was Badali Worker and therefore, there was no dishonest intention to misappropriate the amount of the petitioner Corporation but considering the gravity of misconduct, punishment was imposed by the competent authority for stoppage of seven increments with permanent effect. Considering all these aspects, the tribunal has committed gross error in coming to such conclusion that punishment of stoppage of seven increments with permanent effect will remain continue till retirement of the respondent workman which will be loss of thousand of Rupees and in reality, he will be loosing 7 years of service for all the purpose. Therefore, in short, submission is, interference in punishment by the tribunal is erroneous which requires to be interfered with by this Court.

#. Learned advocate Mr.Zaveri has mainly relied on the observations made in para-6 & 7 in case of JANATA BAZAR reported in 2000 [7] SCC pg.517. Observations of the paragraphs of aforesaid citation relied by Mr.Zaveri, wherein it is reflected that once the management has lost confidence upon the workman and unblemish past record and gravity of misconduct is serious, punishment imposed by the employer cannot be altered while exercising the powers under Section 11-A of the I.D.Act. It is necessary that in light of the submissions made by learned advocate Mr.Zaveri, the facts mentioned in the reported decision which has been relied upon by petitioner wherein allegations made against the workman, against which, specific finding of fact that charge of breach of trust and misappropriation of goods was clearly established and in case of proved misappropriation, there is no question of considering the past record. Thus, the observations made by the Apex Court in reference to the facts and circumstance of the case before the Apex Court, differ from the facts and circumstances of this case. In the instant case, no doubt the allegations against the respondent workman is that he had collected the fare from the passengers and not issued the tickets but looking to the finding given by the competent authority, the tribunal in terms has come to the conclusion that once the inquiry officer has come to the conclusion that there was no dishonest intention on the part of the workman to misappropriate the amount of Corporation while not issuing the tickets, therefore, the ratio laid down in the decision cited by learned advocate Mr.Zaveri, would not apply in the facts of the case on hands. In the instant case, the factual situation is quite different inasmuch as there is no finding of the competent authority that misconduct of dishonesty and

misappropriation is found to be proved. On the contrary, the intention of dishonesty and misappropriation is not found to be proved and positive conclusion has been arrived at by the inquiry officer that there was no bad intention on the part of the respondent workman while not issuing the tickets, though fare was collected but as such, there was no dishonest or misappropriating intention of the workman. Therefore, with due respect, the decision cited before this Court, would not be of any assistance on factual basis to the present case.

#. However, it is also contention of the learned advocate Mr.Zaveri that exercising the powers by the tribunal under Section 11-A of the I.D. Act, the tribunal has committed an error while modifying or altering the punishment. It is observed that if the tribunal is satisfied that looking to the gravity of misconduct, punishment imposed by the employer is harsh and unjustified or disproportionate to the misconduct, then the tribunal is also entitled to reappreciate the evidence led in the departmental inquiry like an appellate authority. Not only that, the tribunal is also entitled to come to his own conclusion after reappreciating the evidence led in the departmental inquiry. Thus, specific powers have been conferred on the tribunal while enacting the statutory provision under Section 11-A of the I.D.Act. This view has been taken by the Apex Court in case of M/S FIRESTONE TYRE AND RUBBER CO OF INDIA PVT LTD V. THE MANAGEMENT AND OTHERS reported in AIR 1973 SC 1227. I would like to quote relevant observations made in para-37 as under :-

"37. We are not inclined to accept the contentions advanced on behalf of the employers that the stage for interference under Section 11A by the tribunal is reached only when it has to consider the punishment after having accepted the finding of guilt recorded by an employer. It has to be remembered that a Tribunal may hold that the punishment is not justified because the misconduct alleged and found is such that it does not warrant dismissal or discharge. The tribunal may also hold that the order of discharge or dismissal is not justified because the alleged misconduct itself is not established by the evidence. To come to a conclusion either way, the Tribunal will have to reappraise the evidence for itself. Ultimately it may hold that the misconduct itself, is not proved or that the misconduct proved does not warrant the punishment of dismissal or discharge. That is why,

> according to us, Section 11A now gives full power to the Tribunal to go into the evidence and satisfy itself on both these points. Now the jurisdiction of the Tribunal to reappraise the evidence and come to its conclusion enures to it when it has to adjudicate upon the dispute referred to it in which an employer relies on the findings recorded by him in a domestic enquiry. Such a power to appreciate the evidence and come to its own conclusion about the guilt or otherwise was always recognised in a Tribunal when it was deciding a dispute on the basis of evidence adduced before it for the first time. Both categories are now put on a par by Section 11A."

#. Therefore, looking to the Apex Court decision, the tribunal has power to act as an appellate authority to reappreciate the evidence led in departmental inquiry and to reappreciate the finding of the competent authority. In the present case also, the tribunal has rightly reappreciated the finding given by the competent authority that no doubt the facts are undisputed before the authority but there was no bad intention on the part of the respondent workman to recover the fare with purpose to misappropriate the amount of the petitioner Corporation. Therefore, gravity of the misconduct has been taken into account by the tribunal and punishment has been altered accordingly. Therefore, alteration of punishment considering the finding recorded by the competent authority, the tribunal has not committed any error and there seems no jurisdictional error nor any procedural irregularity committed by the Tribunal.

#. Learned advocate Mr.Zaveri has also relied on the past record of the workman wherein, in all 58 defaults registered against the respondent workman and it is also further pointed out that this past record was also produced before the tribunal. However, it is noted that on what occasion the employer will take the past record into consideration for justifying the action which has been taken by the employer. In the present case, from the record it is not clear whether any show cause notice has been issued to the respondent workman before passing the punishment order in question. It is also not clear from the record nor it is the case of the petitioner Corporation that before passing the punishment order against the respondent workman, this past record has been disclosed to the respondent workman and explanation was called for from the respondent workman. It has not come on record that the petitioner has pointed out to the

respondent workman that considering the past record as well as gravity of misconduct for punishment of stoppage of seven increments with cumulative effect should not be imposed on the respondent workman. Therefore, the past record when it was not disclosed to the respondent workman during the course of inquiry and no such opportunity was given to the respondent workman for giving explanation in reference to his past conduct and same was not relied upon at the time of imposing the punishment, then subsequently mere production of such record in order to substantiate the quantum of punishment just to justify the punishment on the basis of past record, naturally, the tribunal can ignore such past record when it was not part of the departmental inquiry proceedings. The tribunal has to consider the legality and validity of the punishment order in question. While examining the legality and validity of the punishment order, if the gravity of the misconduct is not justified, the punishment and the tribunal is satisfied to the effect that punishment on the basis of the gravity of misconduct which has been found to be proved, is harsh and unjustified, the tribunal is certainly entitled to interference with such punishment order and to alter the punishment order. Not to disclose the past record at the relevant time to the respondent workman, in such eventuality, it cannot be considered to be part of the departmental inquiry and no opportunity was given to the respondent workman about explaining his past conduct. Not only that, punishment itself is not imposed while taking into account the past record, then the Corporation will not be entitled to get support from such past record subsequently to justify the punishment in question especially when the tribunal is satisfied that punishment is harsh and unjustified. This aspect has been examined by the Apex Court in case of STATE OF MAYSORE V. K. MANCHE GOWDA reported in AIR 1964 SC 506. Relevant observations made by the Apex Court in para-7, 8 and 9 of the aforesaid decision decision are referred as under :-

> [7] Under Art. 311(2) of the Constitution, as interpreted by this Court, a Government servant must have a reasonable opportunity not only to prove that he is not guilty of the charges levelled against him, but also to establish that the punishment proposed to be imposed is either not called for or excessive. The said opportunity is to be a reasonable opportunity and, therefore, it is necessary that the Government servant must be told of the grounds on which it is proposed to take such action: see the decision of this Court in the

State of Assam v. Bimal Kumar Pandit(1). If the grounds are not given in the notice, it would be well nigh impossible for him to predicate what is operating on the mind of the authority concerned in proposing a particular punishment: he would not be in a position to explain why he does not deserve any punishment at all or that the punishment proposed is excessive. If the proposed punishment was mainly based upon the previous record of a Government servant and that was not disclosed in the notice, it would mean that the main reason for the proposed punishment was withheld from the knowledge of the Government servant. It would be no answer to suggest that every Government servant must have had knowledge of the fact that his past record would necessarily be taken into consideration by the Government in inflicting punishment on him; nor would it be an adequate answer to say that he knew as a matter of fact that the earlier punishments were imposed on him or that he knew of his past record. This contention misses the real point, namely, that what the Government servant is entitled to is not the knowledge of certain facts but the fact that those facts will be taken into consideration by the Government in inflicting punishment on him. It is not possible for him to know what period of his past record or what acts or omissions of his in a particular period would be considered. If that fact .was brought to his notice, he might explain that he had no knowledge of the remarks of his superior officers, that he had adequate explanation to offer for the alleged remarks or that his conduct subsequent to the remarks had been exemplary or at any rate approved by the superior officers. Even if the authority concerned took into consideration only the facts for which he was punished, it would be open to him to put forward before the said authority many mitigating circumstances or some other explanation why those punishments were given to him or that subsequent to the punishments he had served to the satisfaction of the authorities concerned till the time of the present enquiry. He may have many other explanations. The point is not whether his explanation would be acceptable, but whether he has been given an Opportunity to give his explanation. We cannot accept the doctrine of "presumptive knowledge" or that of "purposeless enquiry", as their acceptance will

be subversive of the principle of "reasonable opportunity". We, therefore, hold that it is incumbent upon the authority to give the Government servant at the second stage reasonable opportunity to show cause against the proposed punishment and if the proposed punishment is also based on his previous punishments or his previous bad record, this should be included in the second notice so that he may be able to give an explanation.

[8] Before we close, it would be necessary to make one point clear. It is suggested that the past record of a Government servant, if it is intended to be relied upon for imposing a punishment, should be made a specific charge in the first stage of the enquiry itself and, if it is not so done, it cannot be relied upon after the enquiry is closed and the report is submitted to the authority entitled to impose the punishment. An enquiry against a Government servant is one continuous process, though for convenience it is done in two stages. The report submitted by the Enquiry Officer is only recommendatory in nature and the final authority which scrutinizes it and imposes punishment is the authority empowered to impose the same. Whether a particular person has a reasonable opportunity or not depends, to some extent, upon the nature of the subject matter of the enquiry. But it is not necessary in this case to decide whether such previous record can be made the subject matter of charge at the first stage of the enquiry. But, nothing in law prevents the punishing authority from taking that fact into consideration during the second stage of the enquiry, for essentially it, relates more to the domain of punishment rather than to that of guilt. But what is essential is that the Government servant shall be given a reasonable opportunity to know that fact and meet the same.

[9] In the present case the second show cause notice does not mention that the Government intended to take his previous punishments into consideration in proposing to dismiss him from service. On the contrary, the said notice put him on the wrong scent, for it told him that it was proposed to dismiss him from service as the charges proved against him were grave. But, a comparison of paragraphs 3 and 4 of the order of

> dismissal shows that but for the previous record of the Government servant, the Government might not have imposed the penalty of dismissal on him and might have accepted the recommendations of the Enquiry Officer and the Public Service Commission. This order, therefore, indicates that the show cause notice did not give the only reason which influenced the Government to dismiss the respondent from service. This notice clearly contravened the provisions of Art. 311(2)of the Constitution as interpreted by Courts."

#. Learned advocate Mr.Zaveri has also subsequently pointed out that the tribunal has not considered the past record while exercising the powers under Section 11A of the I.D.Act, 1947. When the past record was produced before the tribunal for the first time just to have some assistance and / or justification in support of the punishment imposed by the authority and that past record had not become part of the departmental inquiry and same was not disclosed to the workman, then certainly the tribunal can ignore such past record while examining the legality and validity of the punishment order in question. It is not case of the corporation before the tribunal that while imposing the punishment, along with gravity of misconduct, past record was considered. Thus, the punishment order has been passed, the past record was totally ignored by the competent authority and in such circumstances, the tribunal is entitled to ignore the same as like appellate authority. Therefore, the contention raised by the learned advocate Mr.Zaveri cannot be accepted for simple reason that it was duty of the petitioner Corporation to consider the past record at the time of imposing the punishment. But when the petitioner Corporation has failed to consider past record and punishment was not based on the past record, then the tribunal is entitled to ignore the same as the same was ignored by the competent authority. Therefore, in the present case, the tribunal has examined the legality and validity of the punishment order considering the finding recorded by the inquiry officer to the effect that there was no malafide dishonest intention on the part of the workman to misappropriate the amount of the Corporation, according to my opinion, the tribunal has rightly exercised the powers while altering the punishment order in question on consideration that the punishment order is unjust and disproportionate to the gravity of misconduct and it will have long lasting recurring effect till retirement of the respondent workman. Therefore, the tribunal has not committed any error while modifying the punishment order in question and as such, no

jurisdictional error or no procedural irregularity committed by the tribunal which calls for an interference of this Court while exercising the powers under Article 226 and 227 of the Constitution.

##. According to submissions made by learned advocate Mr.K.S.Zaveri that past record was produced before the labour court which was not considered by the labour court. In support of said submission, it was duty of the petitioner Corporation to prove the facts before the labour court that said past record was considered by competent authority at the time of passing dismissal order. But nothing was produced by Corporation and not justified before the labour court. The past record if not considered by competent authority at the time of passing dismissal order, then it cannot become part and parcel of the departmental inquiry. If it was considered and copy of past record is not supplied to workman then also, such past record cannot be considered against the workman. The said past record is not a material on record. Nothing was produced and justified by the petitioner Corporation. Merely producing past record of the workman before the labour court for justifying dismissal order is not enough and such past record can be ignored in such circumstances. The Labour court can consider only materials on record while exercised the jurisdiction under Section 11-A of the I.D.Act, 1947. In such circumstances, past record is not material on record as required under Section 11-A of the I.D.Act, 1947. Such view has been taken by the Andhra Pradesh High Court in case of A.V.Swami v. Labour Court, Warangal and another reported in 1991 [II] LLJ 430. The relevant observations made in para 4 & 5 are quoted as under :-

"4. To appreciate the above argument of the Learned Counsel, it would be necessary to have a close look at the provisions of Section 11-A of the Industrial Disputes Act which is in the following terms :

"11-A power of labour court, tribunals and National Tribunals to give appropriate relief in case of discharge or dismissal of workman : Where an industrial dispute relating to the discharge or dismissal of a workman has been referred to a Labour Court, Tribunal or National Tribunal for adjudication and, in the course of adjudication proceedings, the Labour Court, Tribunal or National Tribunal as the case may be,

is satisfied that the order of discharge or dismissal was not justified, it may, by its award, set aside the order of discharge or dismissal and direct reinstatement of the workman on such terms and conditions, if any, as it thinks fit, or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require :

Provided that in any proceedings under this Section, the Labour Court, Tribunal or National Tribunal, as the case may be, shall rely only on the materials on record and shall not take any fresh evidence in relation to the matter."

"5. An analysis of this section shows that if the Labour Court is satisfied that the order of discharge or dismissal was not justified, it may, by its award, set aside the order of discharge or dismissal and direct reinstatement of the workman or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal, as the circumstances of the case may require. The proviso to the said section is extremely important for the purpose of the case on hand which reads that in any proceeding under this section, the Labour Court shall rely only on the materials on record and shall not take any fresh evidence in relation to the matter. Therefore, the question is whether the past record of service comes within the category of "materials on record" for the purpose of this case. It is an undisputed fact that the past record of service was neither considered nor referred to by either the workman or the second respondent Corporation at the time of the enquiry against the petitioner. But the past record of service has been considered in a detailed fashion by the Labour Court while coming to the conclusion that the order of removal is justified in the circumstances of the case. In fact, about three full pages have been written about the past record of service of the petitioner. This past record of service is evidently not material on record as visualized in the proviso to Section

> 11-A. Therefore, the question is, would the Tribunal have come to the same conclusion, viz. that the order or removal is justified had it not looked into the past record of the petitioner. Suffice it to state that from the manner in which the award has been passed, it is easy to see that a lot of emphasis has been placed on the past record of service of the petitioner. The approach of the Industrial Tribunal was clearly wrong only on the basis of the appreciation of the material on record and not by taking into consideration the past record of service of the petitioner. In this view of the matter, the award dated April 3, 1987, passed by the Labour Court in I.D. No.141 of 1986 is set aside and the matter is remanded to the Industrial Tribunal for fresh consideration in accordance with the provisions of Section 11-A of the Industrial Disputes Act especially the proviso to the said section, by taking into consideration only the materials on record and not the past record of service of the petitioner. The Labour Court may consider the matter and pass an award within two months from the date of receipt of this order."

Therefore, there is no substance in this petition and the same is rejected at the threshold. No order as to costs.

Date : 16-4-2002 [H.K.Rathod, J.]
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